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No. 89-142

In The

Supreme Court of the United States

October Term, 1989

NELLIE ROSCO, an individual, and as Guardian ad Litem for MATT WATKINS and BILLY WATKINS and MICHAEL ROSCO, an individual,

Petitioners,

vs.

COUNTY OF LOS ANGELES, a Public Entity; DAVID WENZEL, an individual; ROBERT CHAFEE, an individual; WILLIAM YEO, an individual,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Does prosecutorial immunity protect social service workers from liability under 42 U.S.C. § 1983 for initiating child dependency actions and for conducting investigations necessary for the preparation of their case?

2. Can a municipality be held liable under 42 U.S.C. § 1983 in the absence of any allegation that its customs and policies violated petitioner's constitutional rights?

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STATEMENT OF CASE

Petitioner MICHAEL ROSCO was the father of a daughter GABRIELLA ROSCO by his previous marriage with defendant SANDRA ROSCO.[1] (R.4)

SANDRA ROSCO reported to the DEPARTMENT OF CHILDRENS' SERVICES ("DEPARTMENT") of the Respondent COUNTY OF LOS ANGELES that GABRIELLA had been sexually molested by her stepbrothers MATT and BILLY WATKINS while she was visiting MICHAEL ROSCO's house.[2] (R.5)

Respondent DAVID WENZEL, a social service worker employed by the DEPARTMENT, investigated these allegations (R.5). Respondents ROBERT CHAFEE and WILLIAM YEO acted as supervisors of WENZEL in this investigation. (R.4)

Based upon this investigation, the DEPARTMENT concluded that MICHAEL ROSCO's parental rights should be limited. The DEPARTMENT therefore filed a petition to limit MICHAEL ROSCO's parental rights on September 9, 1985. (R.5-6)

The petition alleged that the stepbrothers had molested GABRIELLA. Petitioner MICHAEL ROSCO allegedly had permitted the molestation to occur through

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[1] Although SANDRA ROSCO was a defendant in this action, she was not a party to the appeal, and therefore is not a party to the Petition for Writ of Certiorari.

[2] Unless otherwise noted, all references to the records are to the clerk's transcript on appeal.

inadequate supervision of GABRIELLA. The charges in the petition were later dismissed. (R.5-6)

On June 10, 1987, petitioners NELLIE and MICHAEL ROSCO filed their Second Amended Complaint. This Complaint purported to state a cause of action for deprivation of constitutional rights under color of law in violation of 42 U.S.C. § 1983 and various other causes of action not relevant to the Petition for Writ of Certiorari. (R.1-17)

In their complaint, Petitioners alleged that the allegations in the child dependency petition were false. They also allege that the investigation of the actions of MATT and BILLY WATKINS was conducted in a biased fashion, relied upon unreliable information and was a pretext for investigating the conduct of Petitioner MICHAEL ROSCO.

On June 22, 1987, Respondents filed a Demurrer to the Second Amended Complaint (R.18-70). On November 3, 1987, Judge Mariam Vogel sustained the Demurrer. She ruled that prosecutorial immunity barred the cause of action for violation of 42 U.S.C. § 1983. (Reporter's Transcript 1-12)

On January 26, 1989, the Court of Appeal for the State of California, Second Appellate District, affirmed the trial court's sustaining of the Demurrer. The Court of Appeal held that the individual Respondents were absolutely immune from liability for the initiation of child dependency proceedings under the doctrine of prosecutorial immunity. In addition, Petitioners had failed to plead facts showing a municipal custom and policy of violating constitutional rights as required for municipality liability under 42 U.S.C. § 1983.

On March 7, 1989, Petitioners filed a Petition For Review with the California Supreme Court. On April 20, 1989, the California Supreme Court denied review and directed that the Court of Appeal decision not be published pursuant to California Rule of Court 976.

SUMMARY OF ARGUMENT

Petitioners have failed to show any conflict between the State Court of Appeal decision in this action and the Federal Circuit Court decisions interpreting prosecutorial immunity under 42 U.S.C. § 1983. Instead, the State Court of Appeal decision is completely consistent with the applicable Federal Circuit Court decisions. Consequently, petitioners have not shown any grounds for this court to grant Certiorari.

The application of prosecutorial immunity to the filing of a child dependency action by the respondent Social Service workers and to the investigation of child abuse charges pursuant to the preparation of their case does not conflict with any applicable decisions of the Federal Circuit Courts. Federal Circuit Court decisions support the applicability of prosecutorial immunity to investigations performed by prosecutors as part of prosecutorial function of case preparation. Federal Circuit Court decisions concerning social service workers who performed purely investigative functions or police functions unrelated to the filing of a child dependency action simply do not apply to the instant case.

Moreover, assuming that a conflict exists between the Federal Circuit Courts concerning the applicability of

prosecutorial immunity to social service workers who perform police functions, the instant case provides an inappropriate factual context for the resolution of these issues. In the instant case, the social service worker investigated charges of child abuse as part of preparation for the filing of a child dependency action. This case does not raise the issue of the applicability of prosecutorial immunity to police functions such as the removal of children from their homes by social service workers.

Moreover, the Court of Appeal decision is consistent with the functional analysis for the applicability of prosecutorial immunity set forth by this Court. Respondent social service workers performed the prosecutorial function of initiating child dependency actions. The alleged investigative activities of the respondent social service workers were part of the preparation of their case in a child dependency proceeding and therefore were part of their prosecutorial function. The instant case therefore does not involve the performance of nonprosecutorial functions by prosecutorial employees. The Court of Appeal therefore correctly applied the functional analysis set forth by this Court in determining that prosecutorial immunity was applicable.

Moreover, the holding of the Court of Appeal that the allegations of municipal liability under 42 U.S.C. § 1983 were conclusory is entirely consistent with the applicable Federal Circuit Court decisions and does not warrant the granting of Certiorari.

ARGUMENT

1. THERE IS NO CONFLICT BETWEEN THE FEDERAL CIRCUIT COURT CONCERNING THE APPLICABILITY OF PROSECUTORIAL IMMUNITY TO THE INITIATION OF CHILD DEPENDENCY ACTIONS BY SOCIAL SERVICE WORKERS.

Petitioners NELLIE and MICHAEL ROSCO request this court to grant Certiorari on the grounds that the Federal Circuit Court decisions are in conflict concerning the applicability of prosecutorial immunity to the filing and prosecution of child dependency actions by social service workers.

However, Federal Circuit Court decisions actually are in complete accord concerning the applicability of prosecutorial immunity to the bringing of child dependency actions by social service workers and to investigations pursuant to the preparation of the case in dependency proceedings. The Circuit Courts have consistently held prosecutorial immunity to investigations which consist of the organization, marshalling and evaluation of evidence as part of the prosecutorial functions of a social service worker or probation officer charged with the filing of child dependency actions. However, the Circuit Courts have held the immunity to be inapplicable when a social service worker or probation officer performs purely investigative functions and is not responsible for the initiation of child dependency proceedings. Similarly, prosecutorial immunity does not apply when a social service worker performs police functions unrelated to the filing of child dependency actions such as the removal of children from their home.

In *Imbler v. Pachtman* (1976) 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984, this Court held that prosecutors were absolutely immune from liability under 42 U.S.C. § 1983 for the initiation of a prosecution and presentation of the state's case. In a footnote, this Court indicated that prosecutorial immunity also protected at least some aspects of the prosecutor's obtaining reviewing and evaluating of evidence necessary for the preparation of the case.

The Federal Circuit Court decisions which have squarely addressed the issue have consistently held that prosecutorial immunity protects the initiation of child dependency actions by social service workers or probation officers. The Circuit Court decisions applying in prosecutorial immunity include *Coverdell v. Department of Social and Health Services, State of Washington* 834 F.2d 758, (9th Cir., 1987), *Kurzawa v. Mueller* 732 F.2d 1456, 1458, (6th Cir., 1984) *Malachowski v. City of Keene* 787 F.2d 704, 712, *Meyers v. Contra Costa County Department of Social Services* 812 F.2d 1154, 1156, (9th Cir., 1987) and *Salyer v. Patrick*, No. 88-5377 (6th Cir., January 31, 1989).

In *Meyers v. Contra Costa County Department of Social Services* 812 F.2d 1154 (9th Cir., 1987), the court held that social service workers were entitled to absolute immunity for their performance of quasi-prosecutorial functions in connection with the initiation and pursuit of child dependency proceedings. The Court stated:

> "Although child services workers do not initiate criminal proceedings, their responsibility for bringing dependency proceedings, and their responsibility to exercise their independent judgment in determining when to bring such proceedings, is *not very different from the responsibility of the criminal prosecutor.* The social

> worker must make a quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings against parents who may have abused their children. *The social worker's independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit. We therefore hold that social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings."* (p. 1157)(Emphasis added).

However, consistent with the decisions of other circuit courts declining to apply the immunity to police functions performed by social service workers, the court in *Meyers* did not apply prosecutorial immunity to the decision of the social worker to order a father to stay away from his home prior to the filing of a dependency action.

Numerous Federal Circuit Court decisions have held that prosecutorial immunity protects "the organization, evaluation and marshalling of the evidence" as part of the preparation of the prosecutor's case. Prosecutorial immunity therefore protects investigative activities which are necessary to the preparation of the prosecutor's case and which therefore constitute part of the prosecutorial function. (See, e.g., *Freeman On Behalf Of The Sanctuary v. Hittle* 708 F.2d 442 (9th Cir., 1983), *Ybarra v. Thunderbird Mobile Home Village* 723 F.2d 675, 9th Cir. 1984, *Demery v. Kupperman* 735 F.2d 1139 (9th Cir., 1984) and *Atkins v. Lanning* 556 F.2d 485 (10th Cir., 1977).

The application of prosecutorial immunity to an investigation consisting of the gathering of evidence

required for the initiation of child dependency proceedings by social service workers charged with prosecuting these proceedings therefore is entirely consistent with the interpretation of this immunity by the Federal Circuit Courts.

The Second, Fifth and Tenth Circuit decisions relied upon by Petitioners are not inconsistent with the application of prosecutorial immunity to the initiation of child dependency proceedings in *Meyers v. Contra Costa County Department of Social Services, supra,* and the Court of Appeal decision in *Rosco v. County of Los Angeles.* Instead, these decisions held prosecutorial immunity to be inapplicable to social service workers who performed functions which were purely investigative rather than prosecutorial or social service workers who performed such police functions as the removal of children from their home.

For instance, in *Robison v. Via* 821 F.2d 913 (2nd Cir., 1987), the Second Circuit held that prosecutorial immunity did not protect social service workers from liability for the removal of children from their home. The court did not consider the applicability of prosecutorial immunity to investigations required to gather and marshal evidence for the initiation of a child dependency action.

Similarly, the decisions of the Fifth Circuit in *Austin v. Borel* 830 F.2d 1356 (5th Cir., 1987) and *Hodorowski v. Ray* 844 F.2d 1210 (5th Cir., 1988) do not conflict with the Ninth Circuit interpretation of prosecutorial immunity.

In *Austin v. Borel* 830 F.2d 1356 (5th Cir., 1987), the court declined to apply absolute prosecutorial immunity to child protection welfare workers who performed

purely investigative functions and did not initiate child dependency actions.

In *Austin*, the defendant child protection welfare workers investigated child abuse and reported their findings to the district attorney. They also had the power to obtain a temporary custody order from the local juvenile court by filing a verified complaint. However, unlike the respondent social workers in the instant case, the child protection welfare workers in *Austin did not have the power to initiate child dependency proceedings.*

In *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir., 1988), the court held that prosecutorial immunity did not protect social service workers from liability for the removal of a child from the home. The court did not address the issue of the applicability of the immunity to an investigation required to gather evidence for the initiation of a child dependency action conducted by social service workers with the responsibility of initiating dependency proceedings.

Moreover, in *Spielman v. Madsen*, No. 87-1098 (10th Cir., May 3, 1989), the court held that prosecutorial immunity did not apply to the removal of a child from their home by a social service worker without proper procedural due process protections. Again, the Tenth Circuit did not consider the applicability of the immunity to investigations by a social service worker pursuant to the preparation of their case in a child dependency action.

Consequently, there is no conflict between the Federal Circuit Court decisions concerning the applicability of prosecutorial immunity to the filing of child dependency actions. The Circuit Courts have consistently

applied prosecutorial immunity where the social service workers initiated child dependency actions. The Circuit Courts have interpreted the immunity to protect investigations necessary for the organization, evaluation and marshalling of evidence in the dependency proceeding.

However, the Circuit Courts have declined to apply the immunity where the social service workers do not perform prosecutorial functions but merely investigate child abuse charges without the ultimate responsibility for initiating dependency proceedings. In addition, the Circuit Courts have declined to apply the immunity to the removal of children from their home prior to the initiation of a child dependency action. Neither of these factual situations is present in the instant case.

The Second, Fifth and Tenth Circuit authorities relied upon by Petitioners simply concern different factual situations from those addressed in the Sixth and Ninth Circuit decisions applying prosecutorial immunity. There is no conflict within the Circuits concerning the applicability of this immunity.

Moreover, the interpretation of prosecutorial immunity by the Court of Appeal in *Rosco* is entirely consistent with the functional analysis of the immunity set forth by this court. The gathering of evidence as part of the initiation of child dependency proceedings by social service workers with the responsibility for prosecuting such proceedings clearly constitutes a prosecutorial function. Under a functional analysis, the immunity clearly protects this gathering of evidence by the prosecution.

2. THERE ARE NO GROUNDS FOR REVIEW OF THE COURT'S DETERMINATION OF THE ISSUE OF MUNICIPAL LIABILITY.

Petitioners also attempt to seek a grant of Certiorari on the grounds that the Court of Appeal incorrectly decided the issue of municipal liability. However, the Court of Appeal decision on this issue is completely consistent with the decisions of this Court and the other Federal Circuit Courts.

In *Rosco,* the Court of Appeal merely applied the well-settled principles of law that municipalities may only be held liable under Section 1983 for a municipal custom or policy and that civil rights complaints must allege facts rather than mere conclusions.

In *Monell v. New York City Department of Social Services* (1977) 46 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, this Court held that municipalities may be held liable under 42 U.S.C. § 1983 only if a municipal custom or policy violated the plaintiff's constitutional rights.

In *Koch v. Yunich* 533 F.2d 80 (2d Cir., 1976), the Second Circuit upheld the dismissal of the complaint alleging violations of 42 U.S.C. § 1983 on the grounds that its allegations were conclusory.

In their cause of action for municipal liability, Petitioners merely allege that the County permitted its employees to violate constitutional rights in conclusory terms. Petitioners therefore did not allege any facts establishing a custom or policy of the County to conduct child abuse investigations which violated constitutional rights as required from municipal liability under *Monell.*

In its decision in *Rosco v. County of Los Angeles,* the Court of Appeal merely applied these well-settled principles of law to the conclusory allegations of plaintiff's complaint. Consequently, the Court of Appeal did not make any determination of the issue of municipal liability which is inconsistent with Federal Circuit Court decisions or the decisions of this Court. Consequently, it would be inappropriate for this court to grant Certiorari on this ground.

Petitioners also contend that this Court should grant Certiorari and remand the case with instructions to the Court of Appeal to review its decision concerning municipal liability in the light of the recent decision in *City of Canton v. Harris,* No. 86-1088 (February 28, 1989). However, Petitioners have not alleged that the failure of Respondent COUNTY OF LOS ANGELES to train its employees rose to the level of a "deliberate indifference" to the rights of its inhabitants required for municipal liability under *City of Canton v. Harris.*

In *City of Canton,* this Court held that a municipality's failure to train its employees could establish a custom or policy of violating constitutional rights under § 1983 only if the failure to train rose to the level of a "deliberate indifference" to the rights of the municipality's inhabitants.

The court stated:

> "We hold today that inadequacy of police training may serve as the basis for Section 1983 liability *only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact* . . . Only where

> failure to train reflects an 'deliberate' or 'conscious' choice by the municipality – 'policy' is defined by our prior cases – can a city be liable for such a failure under Section 1983."

The "deliberate indifference" standard set forth in *City of Canton* would not have altered the Court of Appeal's finding that the alleged inadequate training did not rise to the level of custom or policy which violated Petitioner's constitutional rights. The conclusory allegations concerning inadequate training and Petitioners' complaint do not allege any fact showing that this training amounted to a "deliberate indifference" to the constitutional rights of inhabitants of the COUNTY OF LOS ANGELES. Instead, the complaint merely alleged inadequate training in conclusory terms.

Moreover, the numerous procedural safeguards for the constitutional rights of the parties and child dependency proceedings under California law prevent Petitioners from ever establishing a "deliberate indifference to the rights of inhabitants" based upon the alleged inadequate training of social service workers in the investigation of child abuse charges when the only harm caused by the investigation is the filing of a child dependency action.

Under California law, child dependency actions contain numerous procedural safeguards for the constitutional rights of both parent and child other than the training of the social service worker employed to investigate child abuse charges and bring dependency actions. Child dependency proceedings are heard by an impartial hearing officer. These actions also contain such procedural safeguards as the right to counsel and standards

for the admissibility of evidence identical to those civil actions. California Welfare & Institutions Code §§ 349 and 355.

These procedural protections are likely to protect the constitutional rights of the parties in a child dependency action even if the initial investigation is conducted by inadequately trained social service workers. The alleged failure to train social service workers in investigation therefore can never rise to the level of a "deliberate indifference" to constitutional rights under *City of Canton*.

The allegations of inadequate training therefore do not show the "deliberate indifference" to the rights of inhabitants necessary for municipal liability based upon failure to train under *City of Canton v. Harris*.

3. A GRANT OF CERTIORARI WOULD BE INAPPROPRIATE IN THE PRESENT CASE.

Moreover, a grant of Certiorari is simply inappropriate in the present case. In view of the California Supreme Court's decision not to certify the Court of Appeal's decision for publication, the Court of Appeal decision does not have any stare decisis effect under California law. In view of its lack of any precedential value, the case does not raise sufficiently important issues to warrant review by Writ of Certiorari.

California Rule of Court 977 provides in pertinent part that an opinion that is not ordered published shall not be cited or relied on by a court or party in any other action or proceeding. In its denial of the Petition For

Review, the California Supreme Court directed the reporter of decisions not to publish the Court of Appeal decision in *Rosco v. County of Los Angeles*.

This opinion in *Rosco v. County of Los Angeles* does not have any stare decisis effect. Any possible conflict between the *Rosco* decision and Federal Circuit Court decisions is simply not important enough to warrant the granting of certiorari.

Moreover, the instant case does not provide an appropriate factual context for the resolution of any conflicts within the Federal Circuit Courts concerning the applicability of prosecutorial immunity. Any potential conflict between the Federal Circuit Courts concerns the applicability of the immunity to the removal of children from their homes by social service workers. The instant case does not raise this issue. Instead, the instant case solely concerns the applicability of prosecutorial immunity to the filing of a child dependency action by social service workers and to investigations necessary for the preparation of the case in a dependency proceeding.

CONCLUSION

There is no conflict between the Federal Circuit Court decisions concerning the applicability of prosecutorial immunity to the filing of child dependency actions by social service workers. The decisions which squarely address this issue uniformly hold that prosecutorial immunity protect social service workers for the initiation and pursuit of child dependency proceedings. The immunity also protects investigations which are part of the

preparation of the prosecutor's case in child dependency actions.

The Federal Circuit Court decisions relied upon by Petitioners do not conflict with those Circuit Court decisions applying prosecutorial immunity. Instead, these decisions simply decline to extend prosecutorial immunity to social service workers performing purely investigative rather than prosecutorial functions or to police functions such as the removal of children from their home. However, the gathering of evidence as part of the preparation of the case by social service workers who initiate child dependency actions clearly constitutes a prosecutorial function protected by the immunity under the applicable Federal Circuit Court decisions.

Moreover, the granting of a Petition for Writ of Certiorari is inappropriate in view of the lack of any stare decisis effect of the Court of Appeal decision in *Rosco v. County of Los Angeles*.

The ruling of the Court of Appeal on the conclusory allegations concerning municipal liability is consistent with the applicable Federal Circuit Court decisions and the rulings of this Court. Petitioners have not alleged the "deliberate indifference" required for a cause of action for municipal liability based upon failure to train. Moreover, in view of the numerous procedural safeguards which California law imposes in order to protect constitutional rights in child dependency actions, the alleged failure to train social service workers cannot establish "deliberate indifference" to the rights of inhabitants as required for municipal liability.

In addition, any conflicts concerning the scope of prosecutorial immunity existing in the Federal Circuit Court decisions involve issues not raised in this action.

Based upon the foregoing, the Court should not grant Certiorari in this action.

DATED: September 18, 1989

Respectfully submitted,

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